TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 79.

PETER O. SJOLI, PLAINTIFF IN ERROR

vs.

CHARLES DRESCHEL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED AUGUST 15, 1904.

(19,441.)

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1 STATE OF MINNESOTA:

In Supreme Court.

PETER O. SJOLI, Plaintiff in Error,
vs.
CHARLES DRESCHEL, Defendant in Error.

Now comes the above named Peter O. Sjoli, plaintiff in error, and prays that a writ of error in the above entitled case may issue to the said supreme court for the State of Minnesota, to reverse a certain judgment entered in said court on the 11th day of July, 1903, in favor of the said Charles Dreschel, defendant in error, and against the said Peter O. Sjoli, plaintiff in error, for the reason that manifest error has intervened in the rendition of said judgment of said supreme court of Minnesota to the great damage of said plaintiff in error, all of which will more in detail appear from the assignment of error which is filed with this petition.

PETER O. SJOLI,
Plaintiff in Error,
By HOUPT & FIELD,
His Attorneys.

2 [Endorsed:] 13484. State of Minnesota, county of ——. Supreme court. Peter O. Sjoli, plaintiff, *vs.* Chas. Dreschel, defendant. Copy of petition for writ of error.

3 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the State of Minnesota, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity in the said State, in which a decision could be had in a suit between Peter O. Sjoli, plaintiff, and Charles Dreschel, defendant, said suit being there entitled Peter O. Sjoli, appellant, *vs.* Charles Dreschel, respondent, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against its validity, a manifest error hath happened, to the great damage of the said Peter O. Sjoli, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within sixty (60) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 7th day of July, in the year of our Lord one thousand nine hundred four.

[Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.]

HENRY D. LANG,
Clerk of U. S. Circuit Court for
the District of Minnesota.

The above writ is hereby allowed.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

4 [Endorsed:] State of Minnesota, supreme court. Peter O. Sjoli, plaintiff, *vs.* Charles Drescehl, defendant. Writ of error.

5 United States of America to Charles Dreschel, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within sixty days from the date hereof, pursuant to a writ of error filed in the office of the supreme court of the State of Minnesota, wherein Peter O. Sjoli is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be reversed, and speedy justice should not be done in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of Minnesota, this 7th day of July, in the year of our Lord one thousand nine hundred and four.

CHAS. M. START,
Chief Justice of Supreme Court of Minnesota.

Personal service of the within citation is hereby admitted this 8th day of July, 1904.

PARSONS & BROWN,
Attorneys for Charles Dreschel, Defendant in Error.

6 [Endorsed:] 13484. State of Minnesota. Supreme court Peter O. Sjoli, plaintiff, *vs.* Charles Drescehl, defendant Citation.

7 Know all men by these presents, that we, Peter O. Sjoli, as principal, and Knud O. Sjoli and H. G. Brekke as sureties, are held and firmly bound unto Charles Dreschel in the full and just sum of two hundred fifty dollars ($250.) to be paid to the said Charles Dreschel, his heirs, executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 4th day of June in the year of our Lord one thousand nine hundred four.

Whereas lately in the supreme court in the State of Minnesota, in a suit pending in said court, between Peter O. Sjoli, plaintiff and Charles Dreschel, defendant, said suit being there entitled Peter O. Sjoli, appellant *vs.* Charles Dreschel, respondent, judgment was rendered against the said plaintiff, Peter O. Sjoli, and the said plaintiff, having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit and the citation directed to the said Charles Dreschel citing and admonishing him to be and appear at the Supreme Court of the United States at Washington on or before the 5th day of September 1904.

Now the condition of the above obligation is such that if the said Peter O. Sjoli shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect.

PEDER O. SJOLI. [SEAL.]
KNUD O. SJOLI. [SEAL.]
H. G. BREKKE. [SEAL.]

Sealed and delivered in presence of

KATHARYN HODGSON.
N. T. FIELD.

8 STATE OF MINNESOTA, } ss:
County of Otter Tail, }

On this 4th day of June, 1904, before me personally appeared Peter O. Sjoli and Knud O. Sjoli and H. G. Brekke, to me known to be the same persons described in and who executed the foregoing instrument and they acknowledged that they executed the same as their free act and deed.

[Notarial Seal, Otter Tail Co., Minn.]

N. T. FIELD,
Notary Public, Otter Tail Co., Minn.

9 STATE OF MINNESOTA, }
County of Otter Tail, } ss:

Knud O. Sjoli and H. G. Brekke being first duly sworn, say each for himself, that he is one of the sureties above named; that he is a resident and free holder of the State of Minnesota, and worth the sum of two hundred fifty ($250) dollars, specified in the foregoing bond, above his debts and liabilities, and exclusive of his property exempt from execution.

KNUD O. SJOLI.
H. G. BREKKE.

Subscribed and sworn to before me this 4th day of June, 1904.
[Notarial Seal, Otter Tail Co., Minn.]

N. T. FIELD,
Notary Public, Otter Tail Co., Minn.

I hereby approve the within bond and the sureties thereon.

CHAS. M. START,
Chief Justice of the Supreme Court of
the State of Minnesota.

10 [Endorsed:] 13484 State of Minnesota, supreme court. Peter O. Sjoli plaintiff in error *vs.* Charles Dreschel defendant in error. Copy of bond.

11 STATE OF MINNESOTA:

In Supreme Court.

PETER O. SJOLI, Plaintiff in Error,
vs.
CHARLES DRESCHEL, Defendant in Error.

Now comes the above named plaintiff in error, Peter O. Sjoli, by Houpt & Field, his attorney, and says that in the record and proceedings in the above entitled cause, there is manifest error in this, to wit:

I.

This court erred in its judgment wherein it decided that the plaintiff in error obtained no homestead rights to the land in controversy under his settlement in 1894.

II.

This court erred in its judgment wherein it decided that occupancy and cultivation of the land in controversy by the plaintiff in

error unless followed by an entry of the tract within three months may not defeat the right of the Northern Pacific Railway Company under its grant.

III.

This court erred in its judgment wherein it decided that the failure of the plaintiff in error to initiate his claim by an entry at the land office within three months worked a forfeiture to his homestead right to the land in controversy.

IV.

This court erred in its judgment wherein it decided that the list of indemnity selections filed by the Northern Pacific Railway Company in June, 1895 were sufficient in law to convey title to the tract in question and defeat the right of the plaintiff in error.

V.

The court erred in its judgment wherein it decided that the right of the Northern Pacific Railway Company to the land in con-
12 troversy became fixed and absolute by the filing of its selections in June 1895.

VI.

This court erred in its judgment in not deciding that on account of the rejection of its selections of June, 1895, by the Secretary of the Interior, the Northern Pacific Railroad Company could acquire no right to the land in controversy by virtue of its selections.

VII.

This court erred in its judgment wherein it decided that the patent of the United States issued to the plaintiff in error upon his homestead entry entered under section 2239 of the Revised Statutes of the United States did not convey to the plaintiff in error the land in controversy.

VIII.

This court erred in its judgment wherein it held that the Northern Pacific Railroad Company, and through it the defendant in error, acquired a right to the land in controversy under said selection of June 1895 superior to the rights of the plaintiff in error under his said patent.

IX.

This court erred in its judgment in not deciding that the plaintiff was the owner of the land in controversy under his said patent.

Wherefore, the said Peter O. Sjoli, the plaintiff in error, prays that the judgment of the supreme court of the State of Minnesota be re-

versed and the said supreme court be ordered to enter an order in all things reversing the decision and judgment of the trial court.

HOUPT & FIELD,
Attorneys for Plaintiff in Error.

13 [Endorsed:] 13484. Copy of assignments of error. Peter O. Sjoli appellant vs. Charles Dreschl respondent

14 STATE OF MINNESOTA:

Supreme Court, April Term, 1903.

STATE OF MINNESOTA, County of Otter Tail, } ss:

District Court, 7th Judicial District.

PETER O. SJOLI, Plaintiff and Appellant,
vs.
CHARLES DRESCHEL, Defendant and Respondent.

Assignments of Error.

First. The court erred in its first conclusion of law that the plaintiff is not the owner or entitled to the possession of the land described in the complaint.

Second. The court erred in finding that the defendant is the owner and entitled to the possession of the land in question.

15 STATE OF MINNESOTA:

Supreme Court, April Term, 1903.

STATE OF MINNESOTA, County of Otter Tail, } ss:

District Court, Seventh Judicial District.

PETER O. SJOLI, Plaintiff,
vs.
CHARLES DRESCHEL, Defendant.

Stipulation of Facts.

It is hereby stipulated and agreed by and between the parties to the above entitled action, by their respective attorneys, that, for the purpose of the trial of this action, the following facts may be taken to be true, subject to the objection by plaintiff as to immateriality, and shall be considered as evidence herein subject however to the objections noted by plaintiff.

16 I.

That the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the Northern Pacific Railway Company is a corporation created, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget s-und on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act, said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget's sound, with a branch via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

17 III.

That by the third section of said act, lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, wherever it passes through any State, and whenever on the line thereof, the said United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said railroad is definitely fixed, and a plat thereof filed in the office of the Commissioners of the General Land Office; and wherever prior to said time, any of said sections, or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu

thereof, under the directions of the Secretary of the Interior,
18 in alternate sections and designated by odd numbers, not
more than ten miles beyond the limits of said alternate sections."

IV.

That said Northern Pacific Railroad Company duly accepted the terms, conditions and impositions of said act of Congress and signified such acceptance in writing under its corporate seal, duly executed pursuant to the directions of its board of directors first had and obtained, and thereafter, to-wit: December 29, 1864, served such acceptance on the President of the United States.

V.

For the purpose of this trial plaintiff admits paragraph V as true subject to the objection that it is immaterial.

That prior to the 12th day of October, 1870, the said railroad company had duly located the general route of its said road extending from a point on Lake Superior at the mouth of the Montreal river, in the State of Wisconsin, over and across the State of Minnesota to a point on the western boundary of the State of Minnesota opposite to Fargo in the then Territory of Dakota, on the Red River of the North, and prior to said day said railroad company transmitted to the Commissioner of the General Land Office a diagram or map showing the said designated route of said road; that said diagram or map was duly filed in the office of said Commissioner on October 12, 1870. That on the 7th day of November, 1870, said Commis-
sioner of the General Land Office transmitted a prepared
19 diagram showing the designated route of said road, to the
register and receiver of the United States land office at Alexandria, Minnesota, a copy of the letter of Transmittal being as follows, to-wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, November 7, 1870.

Register and receiver, Alexandria, Minn.

GENTLEMEN: The Northern Pacific Railroad Company having filed a corrected map of the line of their road in your district, I herewith transmit a diagram showing the amended line with the twenty mile limits and you are directed to withhold the odd numbered sections as per former instructions.

I have also indicated thereon in pencil, the limits of the former withdrawal. The odd sections falling outside of those limits and within those indicated in yellow will be withdrawn from the date of the receipt of this letter and the even sections will be increased to $2.50 per acre from same date, but will be subject to pre-emption and homestead entry only and at that ratability.

The lands within the pencil lines but outside of the yellow limit will be restored to their condition prior to withdrawal; that is those heretofore offered to private entry, pre-emption and homestead; those unoffered, to pre-emption and homestead at $1.25 per acre.

20 This restoration will be made after 30 days' public notice, which you will give by advertisement in the newspaper of largest circulation in your district. You will insert the notice not more than twice a week for four weeks giving the date of restoration, and the receiver as disbursing agent will pay for same and charge in his disbursing account, transmitting proper vouchers for payment.

You will acknowledge the date of receipt of this and notify us of the day of restoration, also send copy of paper containing notice.

Very respectfully, JOS. S. WILSON,
Commissioner."

That said letter of transmittal and said diagram or map were duly received and filed in the said United States district land office at Alexandria, Minnesota, on November 17, 1870, and the register and receiver of said district land office made and designated upon the records of the said office the notations in accordance with the said map or diagram. That the northeast quarter of the southeast quarter (N. E. ¼ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minnesota, was coterminous with said line of general route so located prior to October 12, 1870, as aforesaid.

VI.

That prior to the 21st day of November, 1871, the said Northern Pacific Railroad Company definitely located that portion of
21 the line of its said railroad, extending from a point in section five (5), township forty-eight (48) north, of range sixteen (16), west of the fourth principal meridian, westwardly over and across the State of Minnesota to a point at Fargo on the eastern boundary of the then Territory of Dakota; and on the 21st day of November, 1871, caused a map showing the line of said definite location, duly approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office. That the northeast quarter of the southeast quarter (N. E. ¼ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minnesota, was situate opposite to and coterminous with said line of definite location, so fixed on the 21st day of November, 1871, and was more than twenty (20) miles, but less than thirty (30) miles distant from the line of definite location, and was in the first indemnity limits of the grant to said railroad company; and said premises last above described were, and are, non-mineral in character. All the remaining portion of this paragraph 6 is objected to by plaintiff as immaterial.

That upon the filing of said map of definite location, so filed in the office of the Commissioner of the General Land Office on the 21st day of November, 1871, the said Commissioner marked and designated upon the maps and records of his office, the limits of the lands so granted by Congress to said railroad company coterminous with the said line, as shown on the map, to-wit: twenty (20), thirty
22 (30), and forty (40) mile limits on each side of said line of definite location; the first named being the lands in place; the second being the limits of the indemnity provided for in said act of Congress July 2, 1864; and the third being the limits of the indemnity provided for in the joint resolution of Congress approved May 31st, 1870.

That thereafter, and on the 26th day of December, 1871, the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land office at Alexandria, Minnesota, (within which district the land above described was then situated) a diagram showing that portion of said railroad line so definitely fixed as aforesaid, with the place and first and second indemnity limits indicated thereon; and said Commissioner of the General Land Office so acting under the directions and instructions of the Secretary of the Interior, instructed and directed the United States district land officers of said land office at Alexandria, Minnesota, to withdraw and hold reserved all the lands situated within the said last described limits, from pre-emption, sale, or homestead entry. That said letter of instructions to said district land officers and said diagram, were duly received and filed in said land office at Alexandria on the 6th day of January, 1872; and said letter of instructions was in the words and figures following, to-wit:

23 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, December 26, 1871.

Register & receiver, Alexandria, Minnesota.

GENTLEMEN: Referring to my letter to you of 15th September, 1870, transmitting a map of the designated line, and 20 mile limit of the land grant of the Northern Pacific railroad and directing withdrawal of land therefor, I now enclose you a map showing the line of the road as constructed together with the definite 20 mile limits of the grant and the additional 10 mile indemnity limits as granted under the original act of July 2d, 1864, and also the additional 10 mile indemnity limits granted by the joint resolution of 31st May, 1870, these limits are respectively designated as the 20, 30 and 40 mile limits.

I have also designated the limits fixed in my letter to you of 15th September, 1870, and you are now directed to withhold from sale or location, pre-emption or homestead entry all the odd numbered sections within the limits designated on the map herewith and not heretofore withdrawn.

You will also increase in price to $2.50 per acre, and dispose of

under the pre-emption and homestead laws only, the even numbered sections formerly outside of the 20 mile limits as designated on the prior map, but now within that limit as shown on the diagram herewith.

The map of constructed line was filed in this office on 21st
24 November ult., from which time the right of the road attached, according to the terms of the granting act of 2nd July, 1864, Stat., vol. 13, page 365.

This order, however, does not affect the status of *bona fide* pre-emption or homestead settlers who may have initiated their claims prior to said 21st November, and such persons will be allowed to prove up their entries either for odd or even sections at $1.25 per acre, according to law.

You will observe by reference to the act of 31 May, 1870, that the additional indemnity lands therein granted are only for making up deficiency caused within their granted or 20 mile limits by the disposal of lands in odd sections since the passage of the act of 2nd July, 1864, and upon the contingency that such deficiency lands cannot be obtained within the 10 mile indemnity limits prescribed by the act of 2nd July, 1864. Nor can the company make selections of any lands heretofore reserved for other railroads, or reserved or granted for any other purpose, and which were still reserved at the date of definite location of the road and map thereof filed in this office.

Therefore in the examination of any lists of lands selected by the company, you will require that those in the 20 mile or granted limits, and those in the 30 mile or first indemnity limits shall be presented in separate lists, and you will eliminate or reject there from any lands to which the United States had not full title, or which are
" reserved, sold, granted, or otherwise appropriated," and not
25 free from pre-emption or other claims, or rights at the time the line of said road was " definitely fixed " and plat thereof filed in the " office of the Commissioner of the General Land Office," which was 21st November, 1871.

It will be further observed that all mineral lands are excluded from the operation of the grant, but that other lands in lieu thereof are granted to be selected within the deficiency limits first mentioned, said mineral lands, however, shall not be held to include iron or coal.

The following lands in even sections, which by our former order of withdrawal were increased in price to $2.50 per acre, are now by the change in the 20 mile limits, brought outside of 20 miles of the road and so far as not disposed of will be opened to entry again after due notice at $1.25 per acre, to-wit * * *

You are now directed to give notice for 30 days, in a newspaper of general circulation in your district, that on a day to be fixed by you, not less than 30 days from the date of notice the above tracts of land, or such of them as are undisposed of will be subject to pre-emption and homestead entry, and to private entry where heretofore

offered at $1.25 per acre and where unoffered, to pre-emption and homestead entry at that price.

The receiver as disbursing agent will pay for the advertisement, and charge in his disbursing account, transmitting therewith proper vouchers for payment.

You are also requested to forward immediately on publication, a copy of the paper containing the notice so that we may be
26 fully advised in the premises.

You will permit no claims to be initiated or private entries allowed upon the tracts after the notice of restoration and prior to the date on which the tracts are restored at the reduced price.

Be pleased to acknowledge receipt of this by date.

Very respectfully, WILLIS DRUMMOND,
Commissioner."

That said northeast quarter of southeast quarter (N. E. ¼ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minnesota, was situated within the limits designated upon said diagram, and within the first indemnity limits thereon, and is more than twenty but less than thirty miles distant from said line of definite location, and was, at the date of said letter of instructions, and at the date when said letter and diagram were received at said district land office, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated and free from preëmption or other claims or rights.

That the instructions in said letter contained were not revoked or altered until August 13, 1887, upon which date the Secretary of the Interior issued an order declaring, in terms, that said instructions were thereby revoked.

27 VII.

That said Northern Pacific Railroad Company, prior to 1885, duly definitely located its said line of railroad, and filed the maps thereof in the office of the Commissioner of the General Land Office, which said maps were duly approved by the Secretary of the Interior, and thereafter said company duly constructed and completed that portion of its said railroad and telegraph line on, over and along said line of definite location, extending from Lake Superior to Puget sound, as aforesaid (both main and branch line), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph lines, equal to or exceeding twenty-five (25) miles in length, were so constructed as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States as provided in said act of Congress approved July 2, 1864.

That the portion of said railroad and telegraph line extending on, over and along said line of definite location from Thomson, a point on the Lake Superior and Mississippi railroad, to the Red River of the North, was so completed in the years 1870 and 1871; that the President of the United States having appointed three com-
28 missioners to examine the same, the said commissioners so examined it, and, on the 10th day of December, 1872, reported to the Secretary of the Interior that said portion of said railroad and telegraph line had been constructed in a good, substantial and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to-wit: January 6, 1873, the Secretary of the Interior transmitted said report to the President of the United States with the following recommendations:

"The commissioners in their report represent that this portion of road has been constructed in a first class manner. I therefore recommend the acceptance of the same, and the issue of patents for lands due on account of the completion thereof."

That said report was accepted and said recommendations approved by the President of the United States January 6, 1873.

VIII.

That on the 19th day of June, 1885, the Northern Pacific Railroad Company filed in the United States district land office at Fergus Falls, Minnesota, (within which district said described land was then situate) a certain list of selections, under its said grant, embracing the said northeast quarter of southeast quarter (N. E. ¼ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minne-
sota, claiming said tract under said act of Congress of July
29 2, 1864, and tendered to the receiver of said district land office all the fees required by law. That the register and receiver of said land district rejected said list and attached thereto the following statement:

"The foregoing list of lands selected by Charles B. Lamborn for the Northern Pacific Railroad Company and situated within the 30 mile limit of the grant to said company is hereby rejected for the reason set forth opposite each description and for the further reason that the list does not contain and specify the land lost for which this is in lieu.

Dated U. S. land office, Fergus Falls, Minn., July 8, 1885.

B. N. JOHNSON, Register.
J. AUSTIN, Receiver."

That upon said list, opposite the description of the whole of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minnesota, is the notation set forth by said register and receiver as the reason for the rejection of said list so far as said section five (5) is concerned, as follows:

"S. ½ S. ½, N. W. ¼ S. W. ¼ covered by H. E. N. ½ N. ½, N. ½ S. E. ¼, N. E. ¼ S. W. ¼ selected by St. Paul, M. & M. Ry. Co."

That from the rejection of its selection list as above set forth said Northern Pacific Railroad Company on July 25, 1885, appealed to the Commissioner of the General Land Office.

30

IX.

That on May 28, 1883, the Secretary of the Interior issued the following instructions of the department, to-wit:

"The Commissioners of the General Land Office.

SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Railroad Company not actually required to supply the lands lost in place within the granted limits.

The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay as indicated in my letter of the 17th instant. The unparalleled demand for lands for actual settlement by great numbers of persons, not only from foreign countries but from the older States, seeking homes, under the settlement laws, along the line and within the vicinity of the Northern Pacific grant, requires, for the best interests of the country and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

In order to facilitate the work for making selections, I think you should instruct the local officers that, when clear lists of selections free from conflict or other objection are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination, leav-

31 ing the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands together with the indemnity lands, tract for tract, from the company as heretofore.

I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

Very respectfully, H. M. TELLER, Secretary."

That on August 4, 1885, the Commissioner of the General Land Office issued the following circular of instructions, approved by the Secretary of the Interior, to-wit:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifyiug the particular deficiencies for which indemnity is claimed; you will then carefully examine your records, tract for tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in

doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions and will not place the selections on record until directed to do so.

Where indemnity selections have heretofore been made without specifications of loss, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed. The selecting agent applying to make
32 indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

Where deficiencies exist for which indemnity is allowed by law the lieu selections must be made from vacant unappropriated land within proper sections and limits nearest the granted selections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

Approved:

L. Q. C. LAMAR, Secretary."

That thereafter and on April 26, 1892, said Northern Pacific Railroad Company filed in the United States district land office at St. Cloud, Minnesota (within which district said described land was then situate) a rearranged list in which it designated the lands theretofore selected in said list filed June 19, 1885, and therein set opposite each specific description of lands so selected the description of a tract of equal area lost from its grant in place, and in lieu of which such indemnity lands had been selected and therein set opposite the north half of southeast quarter (N. ½ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, lot three and the northeast quarter of southwest quarter (N. E. ¼ S. W. ¼) of section
33 thirteen (13), township fifty (50) north, of range fourteen (14), west of the fourth principal meridian, as the particular losses in lieu of which said selection had been made. That said tracts so designated losses in lieu of which said selection was made are coterminous with and within twenty (20) miles of the line of said Northern Pacific railroad as definitely fixed, and had been before the date of the grant to the Northern Pacific Railroad Company, and before the time the line of said railroad coterminous therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, sold, disposed of and patented by the United States, and the said tracts and the whole thereof were excepted from the grant to said Northern Pacific Railroad Company, and said company was entitled to receive indemnity therefor.

X.

That on January 4th, 1889, the plaintiff herein, Peder O. Sjoli, applied at the United States district land office at St. Cloud, Minnesota, (within which district said land was then situate) to make entry of said N. E. ¼ of S. E. ¼, together with N. W. ¼ S. E. ¼ and N. E. ¼ of S. W. ¼ of section 5, in township 133 of range 42 west of the 5th principal meridian in Minnesota, under the homestead laws of the United States; that on February 27th, 1889, said application was rejected on the ground that said land was considered to be within the ten-mile or granted limits of the St. Paul, Minneapolis and Manitoba R. R. Co., subject to the appeal within
34 thirty days; that no further action was taken in reference to said filing; that on January 28th, 1895, the said Peder O. Sjoli again applied at the United States district land office at St. Cloud, Minnesota, (in which district said land was then situate) to make entry of said N. E. ¼ of S. E. ¼, together with the N. W. ¼ of S. E. ¼ & N. E. ¼ of S. W. ¼ of section 5, in township 133 of range 42, west of the 5th principal meridian in Minnesota, under the homestead laws of the United States; that thereafter and on March 22nd, 1895, a hearing was had for the purpose of ascertaining and determining the respective rights to said land as between said applicant Sjoli and said Northern Pacific Railroad Company; that upon the testimony taken at said hearing the register and receiver of said district land office held and decided in favor of said Sjoli as against said Northern Pacific Railroad Company, their decision being in words and figures following, to-wit:

"Before United States Land Office, St. Cloud, Minnesota, April 15th, 1895.

35 Involving the N. ½ S. E. ¼, S. E. ¼ S. W. ¼, Sec. 5, Tp. 133, R. 42.

PETER O. SJOLI, Plaintiff,
vs.
NORTHERN PACIFIC R. R. Co., Defendant.

Decision.

On the 15th day of January, A. D. 1895, the above named plaintiff made application at this office to enter the N. ½ S. E. ¼, S. E. ¼ S. W. ¼, sec. 5, tp. 133, R. 42. A hearing was ordered by this office between the plaintiff and the defendant, for the 15th day of March, A. D. 1895, at ten o'clock a. m., before R. H. Marden, Esq., court commissioner of Otter Tail county, at his office at Fergus Falls, Minnesota, at which time the testimony of the respective parties would be taken, which testimony was to be considered by this office on the 22nd day of March, A. D. 1895, at ten o'clock a. m.

At said hearing F. J. Pfefferle, Esq., appeared as attorney for the defendant.

From the testimony and evidence so adduced at said hearing, the register and receiver of this office find the following

36 Facts.

That the above named plaintiff declared his intention to become a citizen of the United States before the district court of Otter Tail county, Minnesota, on the 12th day of May, A. D. 1883.

That he first settled upon said tract of land in dispute on the 14th day of October, A. D. 1884, and grubbed and broke thereon about 2½ acres, built a house and stable and moved into said house on the 4th day of October, A. D, 1884, with his family, and that he has lived upon the above described premises continuously with his family ever since said time. That he now has about 22 acres of breaking on said land and 220 rods of fencing, a well, good house, and a stable, and that his improvements are of the value of $500.00. That the plaintiff's house is on the N. E. ¼ S. E. ¼ of sec. 5, tp. 133, R. 42.

And we further find, that on the 27th day of December, A. D. 1894, one Charlie Drechsel made homestead application at this office for the N. E. ¼ S. E. ¼ of sec. 5, tp. 133, R. 42, which said application was rejected by this office. That an appeal was filed by said Drechsel from this office, on the 29th day of January, A. D. 1895. That said appeal was transmitted to the Commissioner of the General Land Office on the 26th day of February, A. D. 1895. And as

Conclusions of Law,

37 we find that the said plaintiff, prior to June 16, A. D. 1885, was a qualified entryman; that he intended to acquire title to said land through the homestead laws of the United States, and therefore the application of plaintiff should be allowed, subject to any superior right of Charlie Drechsel, so far as the N. E. ¼ S. E. ¼, sec. 5, tp. 133, R. 42, is concerned. And we further find that the claim of the Northern Pacific Railroad Company should be rejected.

It is so ordered.

Dated: St. Cloud, Minn., April 15, A. D. 1895.

THEO. BRUENER, Register.
C. F. MacDONALD, Receiver."

That from said decision said Northern Pacific Railroad Company duly appealed to the Commissioner of the General Land Office. That in the meantime the matter of the rejection of the list of selections filed by said Northern Pacific Railroad Company on June 19, 1885 (as amended by the list filed April 26, 1892) came before said Commissioner of the General Land Office on the appeal of said Northern Pacific Railroad Company, and said Commissioner con-

sidered the appeal filed by said railroad company from the decision by the said district land officers allowing the application of said Sjoli to make entry of said northeast quarter of southeast quarter (N. E. ¼ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minnesota, in connection with the appeal from the rejection of said selection list so filed June 19, 1885, as aforesaid. And said Commissioner of the General Land Office on October 14, 1896,
38 rendered his decision in the words and figures following, to-wit:

"OCTOBER 14, 1896.

Register and receiver, St. Cloud, Minnesota.

SIRS: An examination has been made of the application of the Northern Pacific Railroad Company to select the following lands as indemnity, list No. 9, which was rejected by the local officers at Fergus Falls (now St. Cloud) July 8, 1885, from which action the company appealed to this office.

Re-arranged list No. 9 D. designating the lost lands tract for tract as a basis for its selection, was filed by said company April 26, 1892.

The lands included in this list are within the primary limits of the grant to the St. Vincent Extension Railway Company, and were listed by said company December 2, 1873, list No. 2.

The line of its road was definitely located December 20, 1871.

The lands are also within the limits of the withdrawal of 1870 upon general route for the Northern Pacific Railroad Company, and as between these two companies were awarded the latter company by the U. S. Supreme Court March 2, 1891, in the case of The St. Paul & Pacific R. R. Company *v.* Northern Pacific R. R. Company (139 U. S. 1).

The priority of right to these lands being in the Northern Pacific Company, list No. 2 of the St. Vincent Company is held for cancellation to the extent of the following lands subject to appeal.

39 * * * N. ½ S. E. ¼ and N. E. ¼ S. W. ¼ of sec. 5, T. 133, R. 42.

On January 15, 1895, Peder O. Sjoli applied to make homestead entry for the N. ½ S. E. ¼ and N. E. ¼ S. E. ¼ of said section, alleging settlement thereon in 1884. A hearing was had upon his allegations, and upon the testimony submitted the local officers held that his application should be allowed, subject to the right of Charles Drechsel for the N. E. ¼ S. E. ¼ of said section, from which the Northern Pacific Railroad Company appealed.

The testimony shows that Peder O. Sjoli declared his intention to become a citizen of the United States May 12, 1883; that he made settlement on the land October 14, 1884, and has resided thereon ever since, cultivating a portion thereof every year. He is a qualified homestead claimant, and has valuable improvements on the land. His application is accordingly held for allowance, subject to appeal. So advise him.

It appears that on December 27, 1894, one Charlie Drechsel applied to make homestead entry for the N. E. ¼ S. E. ¼ of said section 5, alleging that he was then residing on the land, that he was the head of a family and had declared his intention to become a citizen of the United States, and had improvements valued at $200. His application was rejected for the reason that the land had been listed December 2, 1873, by the St. Vincent Extension Railway Company, and was applied for June 16, 1885, by the Northern Pacific Railroad Company, and Drechsel appealed to this office.

40 Drechsel declared his intention to become a citizen of the United States October 1, 1894, consequently he could acquire no rights under his settlement until that date, which was too late to defeat the claim of Peder O. Sjoli, or that of the railroad company. His application is accordingly rejected, subject to appeal. So advise him."

That thereafter said plaintiff, Peder O. Sjoli, made final proof in all respects as prescribed by the laws of the United States relating to homesteads before the register and receiver of the United States district land office at St. Cloud, Minnesota, and tendered the fees required by law, and thereupon and on August 25, 1900, final receiver's receipt No. 10604 was issued to said plaintiff, wherein it was recited that the said plaintiff was entitled to a patent for said land from the United States. That in accordance therewith the Government patent was duly issued to plaintiff on June 18th, 1901, and said plaintiff now claims said land and premises and the right of possession thereof under and by virtue of said patent.

That said patent is in words and figures following, to-wit:

4–404.

The United States of America to all to whom these presents shall come, Greeting:

Homestead Certificate No. 10604.

Application 21439.

41 Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Saint Cloud, Minnesota, whereby it appears that, pursuant to the act of Congress approved 20th May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Peder O. Sjoli has been established and duly consummated, in conformity to law, for the north half of the southeast quarter and the northeast quarter of the southwest quarter of section five in township one hundred and thirty-three north of range forty-two west of the fifth principal meridian in Minnesota, containing one hundred and twenty acres, according to the

official plat of the survey of the said land, returned to the General Land Office by the surveyor general.

Now know ye, that there is, therefore, granted by the United States unto the said Peder O. Sjoli thereof, unto the said Peder O. Sjoli and to his heirs and assigns forever.

In testimony whereof, I, William McKinley, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the eighteenth day of June, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the
42 one hundred and twenty-fifth.

By the President:

WILLIAM McKINLEY,

[SEAL.] By F. M. McKEAN, Secretary.

Recorded Minnesota, vol. 269, page 82.

G. W. BUSH,
Recorder of the General Land Office.

That prior to April 21, 1900, the Northern Pacific Railway Company succeeded to all the rights of the Northern Pacific Railroad Company in and to the said northeast quarter of southeast quarter (N. E. ¼ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minnesota.

That on April 21, 1900, said defendant, Charles Dreschel, entered into a contract in writing with said Northern Pacific Railway Company, wherein said defendant agreed to purchase and said Northern Pacific Railway Company agreed to sell to him, the said northeast quarter of southeast quarter (N. E. ¼ S. E. ¼) of section five (5), township one hundred thirty-three (133) north, of range forty-two (42), west of the fifth principal meridian, Minnesota.

That said contract is in the words and figures following, to-wit:

"Minnesota Division.

Five Year Contract.

No. 19531.

Northern Pacific Railway Company.

43 This agreement, made this twenty-first day of April, A. D. 1900, between Northern Pacific Railway Company, a corporation duly incorporated under the laws of the State of Wisconsin, party of the first part, and Charles Dreschel of Fergus Falls, of the county of Otter Tail and State of Minnesota, party of the second part, witnesseth:

The party of the first part, in consideration of the sum of two hundred ($200.00) dollars, to be paid as hereinafter agreed, and of the faithful performance of the covenants, agreements and conditions hereinafter expressed on the part of the party of the second part agrees to sell to the party of the second part the parcel of land situate and being in the county of Otter Tail and State of Minnesota, described as follows, to-wit: The northeast quarter of the southeast quarter of section number five (5) in township one hundred thirty-three (133) north, of range number forty-two (42), west of the fifth principal meridian, containing forty (40) acres, more or less, according to the United States Government survey, together with the hereditaments and appurtenances thereunto belonging; excepting from said lands, however, a strip, or strips, of land, extending through the same (or so much of such strip or strips of land as may be within said premises), of the width of two hundred feet on each side of the center of the main line of the Northern Pacific railway as now constructed, and fifty feet on each side of the center of any branch or other railroad now built or located on the ground, operated,
44 leased or controlled, or to be operated, leased or controlled, in whole or in part by the party of the first part, its successors or assigns.

The party of the second part covenants and agrees to purchase of the party of the first part the above described lands, and to pay therefor the sum of two hundred ($200.00) dollars, with interest at six per cent. per annum, in the manner following, that is to say: The sum of $34.00, thirty-four dollars at or before the execution of this contract, the receipt of which is hereby acknowledged:

The sum of $34.00 principal, $9.96 interest, on the 21st day of April, A. D. 1901.

The sum of $33.00 principal, $7.92 interest, on the 21st day of April, A. D. 1902.

The sum of $33.00 principal, $5.94 interest, on the 21st day of April, A. D. 1903.

The sum of $33.00 principal, $3.96 interest, on the 21st day of April, A. D. 1904.

The sum of $33.00 principal, $1.98 interest, on the 21st day of April, A. D. 1905, payable at the office of the treasurer of said first party.

In case the party of the second party shall fail to pay when due any installment of principal or interest specified above, or to pay any taxes or assessments before the date when the same shall become delinquent, or shall be in default in respect of any other condition of this agreement, then the whole amount of principal unpaid shall at the option of the party of the first part, become due and payable forthwith without notice.

The party of the second part, for himself and his assigns,
45 hereby covenants that he will, on receiving notice so to do from the party of the first part, erect a good and substantial fence, sufficient to turn stock, to comply with the requirements of law, on the line or lines between any part of said described premises,

49 STATE OF MINNESOTA, County of Otter Tail, } ss:

District Court, Seventh Judicial District.

PETER O. SJOLI, Plaintiff,
vs.
CHARLES DRESCHEL, Defendant.

This case having been duly brought on for trial before the court without a jury, upon an agreed stipulation of facts made by the parties hereto, C. L. Baxter, Esq., appearing as attorney for the plaintiff, and Messrs. Parsons & Brown as attorneys for the defendant, the court finds as facts herein that the stipulation of facts made by the parties hereto which is hereunto annexed and hereby made a part of this decision, is a true statement of facts herein as found by the court, and as conclusions of law, the court finds that the plaintiff is not the owner or entitled to the possession of the land described in the complaint; on the contrary the court finds that the defendant is the owner and entitled to the possession of the land in question.

Let judgment be entered accordingly. The court further finds that each party should pay his own costs, and that no statutory costs be allowed.

Dated, St. Cloud, Minnesota, May 24th, 1902.

By the court,

D. B. SEARLE,
District Judge.

50 STATE OF MINNESOTA, County of Otter Tail, } ss:

District Court, Seventh Judicial District.

PETER O. SJOLI, Plaintiff,
vs.
CHARLES DRESCHEL, Defendant.

It is hereby stipulated and agreed by and between the parties to the above entitled action that the above and foregoing is a full and true transcript of all the proceedings had and taken on the trial of said cause, and that the same may be signed, settled and allowed by the judge who tried said cause without further or different notice, as, and for the settled case herein.

Dated December 22nd, 1902.

CHAUNCEY L. BAXTER,
Attorney for Plaintiff.
PARSONS & BROWN,
Attorneys for Defendant.

The above and foregoing record having been examined by me and found conformable to the truth and facts in said cause, and to contain all the records therein, together with the findings and order of the court, and to be a full and complete record of all the
51 proceedings had and taken in said cause, the same is hereby signed and settled as the case herein for all the purposes of this action.

Dated January 17, 1903.

D. B. SEARLE,
District Judge.

STATE OF MINNESOTA, }
County of Otter Tail, } ss:

District Court, Seventh Judicial District.

PETER O. SJOLI, Plaintiff,
vs.
CHARLES DRESCHEL, Defendant.

GENTLEMEN: Please take notice, that on the 17th day of January, 1903, at ten o'clock in the forenoon, at chambers in the city of St. Cloud, Minn., the plaintiff will on the settled case in the above entitled action, and on all the files in the same, move the court for a new trial of said action, or in case that is denied, for judgment notwithstanding the decision, which said motion will be made upon the following grounds:

First. That the decision of the court in said action is not justified by the evidence, and is contrary to law.

52 Second. Errors in law occurring at the trial and duly excepted to by the said plaintiff.

And plaintiff specifies the errors upon which he will ask a new trial as follows:

First. That the court erred in its first conclusion of law that the plaintiff is not the owner or entitled to the possession of the land described in the complaint.

Second. That the court erred in finding that the defendant is the owner and entitled to the possession of the land in question.

Dated January 16, 1903.

CHAUNCEY L. BAXTER,
Attorney for Plaintiff, Fergus Falls, Minn.

To Parsons & Brown, attorneys for defendant, Fergus Falls, Minn

(Title of Cause.)

It is hereby stipulated and agreed by and between the parties to the above entitled action, that the above motion for new trial may be submitted to the court at the time therein mentioned, and the

court may forthwith consider the same and make his ruling thereon, all formalities as to notice being waived.

January 16, 1903.

CHAUNCEY L. BAXTER,
Attorney for Plaintiff.
PARSONS & BROWN,
Attorneys for Defendant.

53 STATE OF MINNESOTA, County of Otter Tail, } ss:

District Court, Seventh Judicial District.

PETER O. SJOLI, Plaintiff,
vs.
CHARLES DRESCHEL, Defendant.

The motion on the part of the plaintiff for judgment notwithstanding the decision filed herein and in case such motion should be denied then for a new trial, having been duly argued by Chauncey L. Baxter, Esq., attorney for the plaintiff, and by Messrs. Parsons & Brown as attorneys for the defendant, and the same having been duly considered:

It is ordered that said motions be and the same hereby are denied. Stay of proceedings herein for thirty days from notice of the filing of this decision.

Dated St. Cloud, Minnesota, January 17th, 1903.

By the court:

D. B. SEARLE,
District Judge.

54 STATE OF MINNESOTA, County of Otter Tail, } ss:

District Court, Seventh Judicial District.

PETER O. SJOLI, Plaintiff,
vs.
CHARLES DRESCHEL, Defendant.

SIRS: You will please take notice that the above named plaintiff Peter O. Sjoli appeals to the supreme court of the State of Minnesota, from the order of the court in this action made an- entered herein on the 17th day of January, 1903, denying plaintiff's motion for judgment notwithstanding the decision, or for a new trial in said cause; and that this appeal is taken from said order and the whole thereof.

Dated February 2nd, 1903.

CHAUNCEY L. BAXTER,
Attorney for Plaintiff, Fergus Falls, Min.

To Parsons & Brown, attorneys for defendant, Fergus Falls, Minn., and C. F. Hanson, clerk of the district court, Fergus Falls, Minn.

Due and personal service of the above notice of appeal is hereby admitted at Fergus Falls, Minn., this 3rd day of February, 1903.

PARSONS & BROWN,
Attorneys for Defendant.
C. F. HANSON,
Clerk of the District Court, Otter Tail County, Minn.

55 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1903.

PETER O. SJOLI, Appellant,
vs.
CHARLES DRESCHEL, Respondent. } Syllabus.

1. Held, applying the rules established in Sage *vs.* Swenson, 67 N. W., 544, 64 Minn., 517, and McHenry *vs.* Nygaard, 74 N. W., 1106, 72 Minn., 2, that defendant is the owner of and entitled to possession of, the tract of land in controversy.

Order affirmed.

56 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1903.

PETER O. SJOLI, Appellant,
vs.
CHARLES DRESCHEL, Respondent. } Opinion.

Action of ejectment.

The plaintiff's title depended upon a patent obtained under the homestead law of the United States while the defendant relied upon a fully executed contract with the Northern Pacific Railway Company for the purchase of the tract; its title being based upon its land grant, a map of definite location of the line of road which was duly filed November 21, 1871, and its selection of the tract in question as part of its indemnity lands, it being more than 20 and less than 30 miles from the main line of the railway. The facts were stipulated: In 1884 the plaintiff settled upon the land—forty acres—at which times it was in a state of reservation under a withdrawal order made by the Secretary of the Interior immediately upon the filing of a map of definite location by the railroad company. He made no application to enter the land until 1889, and this application was rejected on the ground that the 40 acres *was* within the limits of another land grant, to the St. Paul &

Pacific Company. No appeal was taken from this decision. He made another application in January, 1895, which was allowed by the local land officers. Final proof was made in August,
57 1900; the patent being issued to him in June, 1901. The defendant's settlement upon the 40 was made in 1886, with the intention of making the land a homestead under the laws of the United States, and he has ever since resided thereon. His application to enter the land under the homestead act was made December 27, 1894, but it was properly rejected by the local officers. At the time plaintiff settled upon the land in 1884 the homestead law required him to make and file his application for an entry of the land within three months from the date of his settlement, but this he failed to do; making no application until January, 1895, as before noted. In June, 1885, pursuant to the instructions of the Secretary of the Interior to the Commissioner of the General Land Office, dated May 28, 1883, the Northern Pacific Company filed in the proper land office its list of indemnity selections, embracing the tract in question, which list was rejected by the local officers upon the grounds, first, that the list did not specify the land lost, in lieu of which that included in the list was selected; and, second, because this tract had been previously appropriated by the St. Paul & Pacific Company claiming under its grant.

Plaintiff obtained no homestead rights under his settlement in 1884. Mere occupation and cultivation, without compliance with the law requiring that he record his claim by an entry at the local land office within three months from the date of his settle-
58 ment, was insufficient to defeat the complete right of the railroad company, under its grant, to select this particular tract of land for indemnity purposes. McHenry vs. Nygaard, 72 Minn. 2, 74 N. W., 1106. So that the plaintiff had no claim thereto, as against the company, when, in June, 1885 it filed a list of indemnity selections, embracing the tract in question, in the proper land office. He had not complied with the express provisions of the homestead law, fixing the time within which it was incumbent upon him to place his claim on record by filing his application and making entry, and had forfeited any right by virtue of his settlement. Maddox vs. Burnham, 156 U. S., 544, 15 Sup. Ct., 544, 39 L. Ed., 527.

It is immaterial that this list of selections was rejected by the Government officials, for their act was without authority of law, and it was also immaterial that the list did not specify the land lost, in lieu of which that included in the list was selected, because under the directions and instructions of the Secretary of the Interior, then in full force, tract for tract selections were not required. And further, it was also of no moment that the tract in dispute had already been selected by the St. Paul & Pacific Company, under another grant, because it was afterwards determined that this company had no right whatever to it. The rights of the Northern Pacific Company became fixed and absolute in June 1885, when it filed its list

of selections, notwithstanding this list was rejected by the
50 land officers and they absolutely refused to accept it. McHenry *vs.* Nygaard, *supra*. As will be noticed from the dates this list was filed, the selections were made and the rights of the company were fixed and vested almost four years before the plaintiff made any application whatever to enter the land. The original filing in June 1885, was sufficient and fixed the rights of the company, because it had done all that it could, and all that it was in law required to do, to perfect its title to the land; and its failure at that time to attain its right was solely by reason of the error or mistake of executive officers of the Government. Nor was this fixed right affected by its subsequent action in 1892 when it rearranged its list of selections in obedience to an unauthorized requirement of the Secretary. Sage *vs.* Swenson, 64 Minn., 517, 67 N. W., 544.

Plaintiff's attorneys call attention to Musser *vs.* McRae, 38 Minn., 406, 38 N. W., 103, and Resser *vs.* Carney, 52 Minn., 397, 54 N. W., 89. The language of the act now before us is entirely different from that considered in Musser *vs.* McRae. Its wording is that "other lands shall be selected by said company in lieu thereof under directions of the Secretary of the Interior." The Secretary is nowhere authorized or required to formally approve the selections. The Resser case was cited and relied upon in McHenry *vs.* Nygaard, and the claim now made for it was then disposed of. Defendant is the owner of, and entitled to possession of, the tract of land in controversy.

Order affirmed.

COLLINS, J.

60 [Endorsed:] No. 13484 State of Minnesota, supreme court. Peter O. Sjoli, appellant *vs.* Chas. Dreschel, respondent Opinion and syllabus Filed June 26, 1903 C. A. Pidgeon, clerk. April term, A. D. 1903 Collins J.

61 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1903.

PETER O. SJOLI, Appellant,
vs.
CHARLES DRESCHEL, Respondent. } No. 141.

Pursuant to an order of court duly made and entered in this cause, on the 11th day of July, A. D. 1903—

It is here and hereby determined and adjudged that the order of the court below, herein appealed from, to wit, of the district court of the seventh judicial district, sitting within and for the county of Otter Tail be and the same hereby is in all things affirmed. And

it is further determined and adjudged that the respondent above named, do havr and recover of said Peter O. Sjoli, appellant herein the sum and amount of forty-six and 35/100 dollars ($46.35) costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 11th day of July, A. D. 1903.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: C. A. PIDGEON, Clerk.

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	9.10
Printer's fees	10.25
Clerk's fees, supreme court	2.00
Filing mandate	
Affidavits and acknowledgments	
Postage	
	$46.35

62 [Endorsed:] 13484. State of Minnesota, supreme court. Transcript of judgment. Filed July 11, A. D. 1903. C. A. Pidgeon, clerk. —— ——, attorney for —. Page No. —, — Book.

STATE OF MINNESOTA, Supreme Court, } ss:

I, C. A. Pidgeon, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court at the capitol, in the city of St. Paul, this 11th day of July, A. D. 1903.

C. A. PIDGEON, Clerk.

63 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1903.

PETER O. SJOLI, Appellant, vs. CHARLES DRESCHEL, Respondent. } No. 148. Appeal from District Court, Seventh Judicial District, County of Otter Tail.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1903, upon the return to the appeal herein—

Now after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below, herein appealed from, be and the same hereby is, in all things affirmed and that the respondent above named have judgment accordingly.

Entered July 11, A. D. 1903.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, Clerk.

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above entitled cause.

Attest:

C. A. PIDGEON, Clerk.

64 [Endorsed:] No. 13484. State of Minnesota, supreme court. Copy of order for judgment. Filed July 11 A. D. 1903. C. A. Pidgeon, clerk. Entered on page —.

65 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1903.

WEDNESDAY MORNING, 9.30 O'CLOCK, June 10, A. D. 1903.

Court convened pursuant to adjournment. All the justices being present.

PETER O. SJOLI, Appellant,
vs.
CHARLES DRESCHEL, Respondent. } Cal. No. 148. Reg. No. 13484.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was submitted to the court for decision upon paper books and briefs of counsel, and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest:

C. A. PIDGEON, Clerk.

The foregoing is a full and true copy of the minutes of argument in the above entitled cause.

Attest:

C. A. PIDGEON, Clerk.

66 [Endorsed:] No. 13484. State of Minnesota supreme court. Copy of minutes of argument. Filed July 11, A. D. 1903. C. A. Pidgeon, clerk.

67 [Endorsed:] No. 13484. State of Minnesota supreme court. Peter O. Sjoli, appellant, against Charles Dreschel, respondent. Judgment roll. Filed July 11, 1904. C. A. Pidgeon, clerk.

68 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, } ss:
Office of Clerk of Supreme Court, }

I, C. A. Pidgeon, clerk of the supreme court of the State of Minnesota, do hereby certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said supreme court of the State of Minnesota, in the case between Peter O. Sjoli, appellant and plaintiff in error, and Charles Dreschel, respondent and defendant in error, including the opinion of the said supreme court therein, as appears from the original files and records of said supreme court of the State of Minnesota.

And I do further certify and return that I have annexed to said transcript and included therewith a copy of the petition for writ of error and of the bond on the writ of error and approval thereof, and the assignments of error as the same remain on file and of record in said supreme court of the State of Minnesota, and the original writ of error from the Supreme Court of the United States, and the original citation issued thereon, with admission of service thereof, and that the foregoing constitutes a true and complete return to said writ of error.

In testimony whereof I have hereunto set my hand and seal of said supreme court of the State of Minnesota at the capitol at Saint Paul, Minnesota, this 26th day of July, A. D. 1904.

[Seal of the Supreme Court, State of Minnesota.]

C. A. PIDGEON,
Clerk of the Supreme Court of the State of Minnesota.

Endorsed on cover: File No. 19,441. Minnesota supreme court. Term No. 79. Peter O. Sjoli, plaintiff in error, vs. Charles Dreschel. Filed August 15th, 1904. File No. 19,441.

FILE COPY.

Supreme Court U. S.
FILED
AUG 17 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.

79

PETER O. SJOLI,
Plaintiff in Error.

vs.

CHARLES DRESCHEL,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

MOSES E. CLAPP,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1905.

PETER O. SJOLI,
Plaintiff in Error.

vs.

CHARLES DRESCHEL,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This action comes to this court on writ of error from a judgment of the Supreme Court of the State of Minnesota entered June 26th, 1903. The action is in ejectment by Peter O. Sjoli, plaintiff below and plaintiff in error, against Charles Dreschel, to recover possession of the Northeast quarter of the Southeast quarter (N. E. ¼, S. E. ¼) of Section five (5), Township one hundred thirty-three (133), Range forty-two (42), in the County of Otter Tail, State of Minnesota.

The plaintiff claims title under a patent issued to him June 18th, 1901 (record 19). The defendant bases his claim of title on a contract of purchase from the Northern Pacific Railway Company bearing date August 21, 1900 (record 20). Upon the definite location of the line of the Northern Pacific Railway Company this tract fell within the first indemnity belt of the grant to that railroad under the act of July 2nd, 1864. June 19th, 1885, the Northern Pacific Railroad Company filed, in the proper local land office at Fergus Falls, Minnesota, a list of selections of lieu lands embracing the above tract to compensate it for lands lost in its granted limits. This list of selections was rejected by the register and receiver for the reason that the list did "not contain and specify the lands lost for which this is in lieu," and for the further reason that the land had been previously selected by the St. Paul, Minneapolis and Manitoba Railway Company (record 13 and 14).

From the rejection of its selection the Northern Pacific Railroad Company appealed to the Commissioner of the General Land office July 25th, 1885. On April 26th, 1892, the Northern Pacific Railroad Company filed in the District land office at St. Cloud, Minnesota, a re-arranged list of lieu lands, in which it designated the lands included in the list of June 19, 1885, and therein set opposite each specific description of land so selected, a description of a tract of equal area lost from its grant in place and which re-arranged list embraced the land in controversy (record 15).

January 4, 1889, the said Peter O. Sjoli, holder of the patent title, applied at the proper land office, to enter under the homestead laws the above mentioned tract of land with other lands. His application to enter at that time was rejected on the ground that the land was held to be within the ten mile, or granted limits of the St. Paul, Minneapolis and Manitoba Railway Company. No appeal was taken from the rejection of his application.

On January 28, 1895, the plaintiff again applied to enter the same land as a homestead. March 22, 1895, a hearing was had on this application to determine the respective rights to said land as between the applicant, Peter O. Sjoli, and the Northern Pacific Railway Company.

From the testimony taken at this hearing, the register and receiver found as facts that Peter O. Sjoli settled on the land October 14th, 1884, with the intention to acquire title to the same under the homestead laws of the United States, and that he made improvements thereon of the value of five hundred dollars ($500.00), and, as conclusions of law, they found that his application should be allowed, and the claim of the Northern Pacific Railroad Company should be rejected (record 16 and 17). On appeal, the Commissioner of the General Land office sustained the findings and conclusions of law of the register and receiver. Sjoli was permitted to make final proof under the entry of January 28th, 1895, and pursuant thereto, patent for the land in controversy issued to him.

Prior to April 21, 1900, the Northern Pacific Railway Company succeeded to all the rights of the Northern Pacific Railroad Company under its land grant and to the land mentioned in this action, subject, of course, to the right of the plaintiff by virtue of his occupation and homestead claim (record 20). There are no disputed questions of fact in the record. That Peter O. Sjoli, plaintiff in error, is the holder of the patent title to the land in question is conceded, and it is also conceded that the defendant has a contract of purchase of the same land with the Northern Pacific Railway Company.

If the railway company, by virtue of its selection of June 19th, 1885, acquired title, as held by the Supreme Court of Minnesota, the patent is void, but, if that selection was ineffectual to confer title on the railroad company, defendant's claim of title is without foundation.

ARGUMENT.

The Supreme Court of the State of Minnesota in its decision, says:

> "The right of the Northern Pacific Company became fixed and absolute in June, 1885, when it filed its list of selections, notwithstanding this list was rejected by the land officers, and they absolutely refused to accept it."

This statement of the law of the case is the basis of the court's judgment determining that the title of the claimant under the Northern Pacific Railway Company is superior to the patent title and is

apparently in direct conflict with the uniform trend of the decisions of this court. The single question involved in this case as now presented, may be stated by asking one question: what rights has a land grant railroad company in the lands in the indemnity limits of its grant prior to selection, and what constitutes a selection? On this question we contend that no vested right can be acquired in indemnity lands under the provisions of the grant to the Northern Pacific Railway Company until there is a valid selection which is approved by the Secretary of the Interior. If a selection is necessary, it seems self-evident that it must be approved or rejected by somebody. A selection of lands by a railway company which did not require favorable consideration by some officer representing the government before it became effective would be an act entirely useless. A selection of indemnity lands is, in many respects, similar to the filing by a settler, and, like a filing, it must be presented to someone as an offer or an attempt to initiate some right or interest in a specific tract of land, and the proper officer on behalf of the government must decide whether or not it should be allowed. In some form of expression in all the land grant acts, the Secretary of the Interior is the officer designated whose assent or approval of a selection is required. The rules and practice of the land department and the decisions of this court have reduced these various provisions for securing the assent of the Secretary to the uniform requirement

that he must approve all selections before they become operative.

The case of Wis. Central Ry. Co. v. Price County, 133 U. S. 496, in which the earlier decisions of the court are referred to, is an illustration of the rule requiring approval of indemnity selections. It is there said:

> "For such land no title could pass to the company, not only until selections are made by the agents of the State, but until such selections were approved by the Secretary of the Interior. The approval of the Secretary was essential to the efficacy of the selections and to give the company any title to the lands selected. His action in that matter was not ministerial, but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands, and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach the proper conclusion on these two questions, he had also to inquire and determine whether any lands in place limits had previously been disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road had become definitely fixed. There could be no indemnity unless a loss was established, and in determining whether a particular selection could be taken as indemnity for the loss sustained, he was obliged to inquire into the condition of those indemnity lands and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been appropriated and what portion still remained. This action of the Secretary was required not merely as supervisory of the acts of the agents of the state, but for the protection of the United

States against the improper appropriation of their land. Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for the purpose, and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken for indemnity were incapable of identification. The proposed selections remained the property of the United States.

The government was indeed under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned, but such promise passed no title and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine that until selection made, no title vests in any indemnity lands has been recognized in several decisions of this court."

The rule in that case so emphatically enunciated has been uniformly adhered to by this court ever since.

It has been re-stated in the recent case of Oregon & C. R. Co. v. United States, 189 U. S. 103, where the court says:

"Now, it has long been settled that while a railroad company, after its location acquires an interest in the odd numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific selections until a selection is made with the approval of the land department, and then its right relates back to the date of selection and nothing stands in the way of such disposition of indemnity lands prior to selection, as congress may choose to make."

In the same case, after an elaborate review and

discussion of previous cases relating to the same question, the opinion further states on page 113:

> "Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by congress, no right of the railway company attaches or can attach to specific lands within the indemnity limits until there is a selection under the direction or with the approval of the Secretary."

In the earlier case of the United States v. Mis. K. & T. Co., 141 U. S. 358, where the same question is involved, the court says:

> "As to lands which may legally be taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railway company, for the benefit of which they are contingently granted, but in the fullest legal sense remains in the United States until they are actually selected and set apart under the direction of the Secretary of the Interior specifically for indemnity purposes."

The court then quotes from a former opinion on the same subject:

> "No title to indemnity lands were vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

The selection of June 19, 1885, by the Northern Pacific Railroad Company lacking the approval of the Secretary of the Interior, was ineffective to segregate the lands therein described from the public domain or to confer any right or title on the railroad company. The tract in question was therefore, with respect to the Northern Pacific Rail-

road Company, on January 4, 1889, subject to entry under the homestead laws by any qualified settler. The plaintiff being then a duly qualified entryman, having on that day tendered his application to enter the land, and such application having been erroneously rejected by the district land officers, his right attached to the land to the same extent as if the proffered entry had been actually allowed. This is plainly the reasoning and spirit of the decision in Ard v. Brandon, 156 U. S. 537.

The facts in that case stated in the syllabus are that:

"A, being qualified to make a homestead entry, entered in good faith upon public lands within the indemnity limits of a railroad grant, but not within the place limits. He demanded at the local land office the right to enter 160 acres as a homestead. This was refused on the ground that the tract was within the limits of the grant, although at that time the land had not been withdrawn from entry and settlement. This was subsequently done, and the land conveyed to the railway company. A. remained upon the land, cultivating it. In an action to recover possession from him brought here from the state court by writ of error, held that the application was wrongfully rejected, and that his rights under it were not affected by the fact that he took no appeal."

Speaking of the equitable right in favor of one who, in good faith, attempts to acquire land under the homestead laws, the court says (page 543):

"He had a right to enter the land as a home-

> stead; he pursued the course of procedure prescribed by the statutes; he made out a formal application for the entry and tendered the requisite fees, and the application and the fees were rejected by the officer charged with the duty of receiving them, and wrongfully rejected by him. Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose those rights, because, after this wrongful rejection, he followed the advice of the register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights the law protects him in those rights and does not make their continued existence dependent alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application."

It appears from the record that before the attempted selection of June 19, 1885, the plaintiff entered upon the land with the intentions of taking it as a homestead. The respective rights of Sjoli and the Northern Pacific Railroad Company were litigated in the Department of the Interior. To this department is committed the disposition of public lands, and the primary right and jurisdiction to hear, try and determine all conflicting claims of individuals to any portion of the public domain rests with it. In this case, after a full hearing, the land department recorded its decision, upholding the claim of the homesteader, plaintiff in error, and solemnized and confirmed its decision by issuance of patent. This court has said:

> "The decisions of the land department are

entitled to great respect at the hands of any court." R. R. Co. v. Whitney, 132 U. S. 357.

The language used in the Maxwell Land Grant case concerning the consideration due the patentee may be fitly applied to the facts of this case:

> "The respect due to a patent, the presumptions that all preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the effort to set them aside, to annul them or to correct mistakes in them should only be successful when the allegations upon which this is attempted are clearly stated and are fully sustained by the proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held purporting to emanate from authoritative action of the officers of the government, and in this case under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who presumes to take them in a court of justice. But it should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction shall make such an attempt successful." 121 U. S. 379.

In conclusion, it is respectfully submitted that, because prior to the attempted selection of the land involved, Sjoli went upon the land, established his home thereon with the purpose of acquiring it as a homestead and the land department having recognized the validity of his claim and rejecting the proffered selections tendered by the railway company, the patent issued to him is legal and in har-

mony with the uniform decisions of this court. It follows that the judgment of the Supreme Court of the State of Minnesota should be reversed, and judgment awarded the plaintiff for the possession of the land.

Respectfully submitted,

MOSES E. CLAPP,
Attorney for Plaintiff in Error.

SUPREME COURT.

OF THE

UNITED STATES

October Term, 1905

PETER O. SJOLI, Plaintiff in Error

vs.

CHARLES DRESCHEL, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The statement of facts of the plaintiff in error should be supplemented as follows:

The defendant settled upon the land in controversy in 1886 with the intention of making same a homestead under the laws of the United States and ever since has been in actual possession of said lands as his homestead and has resided thereon with his family. He has repaired the house, erected new buildings and in other ways improved the property (record 23.)

On the 27th day of December, 1894, defendant

made application to the United States Land Office at St. Cloud to enter the land as a homestead, which application was rejected (record 19.)

On the 21st day of November, 1871, the Northern Pacific Railroad Company filed a map showing the location of its line across the state of Minnesota, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office (record 9) whereupon the land involved in the present action was withdrawn from sale, location, pre-emption and homestead entry by the Department of the Interior (record 10-12.) This withdrawal was revoked by an order of the Secretary of the Interior, August 13, 1887 (record 12.)

The plaintiff's settlement upon the land in 1884 was made while the premises were in a state of reservation under the above withdrawal order.

Under the instructions of the Department of the Interior in force at the date of the first selection by the Northern Pacific Railroad Company tract for tract selections were not required (record 14.)

ARGUMENT.

The record discloses that the plaintiff rests upon his legal title obtained under the patent from the United States while the defendant relies upon the equitable title of the Northern Pacific Railroad Company, under which company he holds by contract.

The plaintiff settled on the land in 1884. Under the law as it stood at this time, a homestead settler was required to put his claim on record

within three months from the date of settlement. (See 21 statutes at large, 141, Chap. 89, Sec. 3; Supplement to the Revised Statutes, Vol. 1, page 282, and U. S. Revised Statutes, Secs. 2264 and 2265.) The plaintiff therefore obtained no rights under his settlement, having failed to enter the land at the United States Land Office as required by law. It is not the date of settlement but the date of entry which determines the right of the settler; the entry at the Land Office is the initial act of one seeking to acquire a homestead.

Maddox vs. Burnham, 156 U. S.,544.

"Mere occupation and cultivation, without compliance with the law in the matter of placing the claim on record in the land office, was insufficient to defeat the right of the railroad company, under its grant, to select the land for indemnity purposes. Northern v. Colburn, 164 U. S., 383, 17 Sup. Ct. 98." McHenry v. Nygaard, 72 Minn. 2.

In June, 1885, pursuant to the instructions of the Secretary of the Interior to the Commissioner of the General Land Office, dated May 28, 1883, (record 14) the Northern Pacific Company filed in the proper land office its list of selections embracing the tract in question, which list was rejected by the officers of the Land Office upon the grounds, first, that the list did not specify the land lost for which that included in the list was in lieu, and second, because the land had been selected by the St. Paul M. & M. Railway Co. (record 13-14.)

The rejection of this list was without authority of law upon either ground. It was afterwards determined that the St. Paul M. & M. Railway

Company (the successors to the St. Paul and Pacific Railroad Co.) had no right to the lands (record 18) and under the instructions of the Secretary of the Interior then in force it was not necessary to make a tract for tract selection. (Record 14).

At the date of the filing of its list of selections in 1885 by the Northern Pacific Railway Company it is perfectly clear that either that Company or the St. Paul M. & M. Company was entitled to the land. Their claims were a matter of record many years prior to any attempt on the part of the plaintiff to enter the lands; their rights to the land as against each other were then in litigation in the courts, the final decision resulting in favor of the Northern Pacific Company (Record 18). There would be manifest injustice in holding that the entry of the land in question on the St. Paul M. & M. Railway Company list operated to prevent the Northern Pacific Company from acquiring any rights whatever in the land and left it open to plaintiff's entry, so that the plaintiff alone benefited by the Northern Pacific Company's successful litigation of the question of ownership with the St. Paul M. & M. Company, although the Northern Pacific Company, by filing its list in the proper land office, had done everything in its power to protect and preserve its rights.

The officials of the land department have no arbitrary right to reject selections of indemnity lands, and erroneous and unauthorized rejections of such selections do not affect the rights of the railroad companies. This was the view of the supreme court of Minnesota, in the case of Sage

vs. Swenson, 64 Minn. 517, in which Mr. Justice Mitchell, speaking for the court, says:

"The railway company's selection in 1883 was in all respects a full compliance with the law, the grounds on which it was rejected first by the local officers, and next by the secretary of the interior, being erroneous and unauthorized. The company had done all that it could do, and all that it was in law required to do, to perfect its title to the land; and it failed to attain its right solely by reason of the error or mistake of executive officers of the government. Neither was the right of the company prejudiced by its act in October, 1891, in making a second or amended selection for the purpose of conforming to an unauthorized requirement of the secretary of the interior."

In the case of McHenry v. Nygaard, 72 Minn. 2 the Supreme Court of Minnesota again had before it the question of the right of a railroad company to lands within its indemnity limits under selections wrongfully rejected by the officers of the land department. We quote from the opinion in the case:

"Although the selection of the lieu lands was to be made under the direction of the Secretary of the Interior, they were to be selected by the railroad company, and not by the secretary. If the company was entitled to select the land, and did so in conformity with all the requirements of law, the officers of the land department had no authority arbitrarily to refuse to recognize and approve the selection. The rights of the company under its selection became fixed and vested, notwithstanding such rejection and refusal. Southern v. Wiggs, 43 Fed. 333; St. Paul v. Winona, 112 U. S. 720, 5 Sup. Ct. 334. This selection was made about two years and four months before defendant made any application to

enter the land as a homestead. This disposes of the case."

A distinction should be noted between the language of the grants which were before this court in the cases of Wis. Central Ry. Co. v. Price County, 133 U. S. 496; and United States v. Missouri K. &. T. Co. 141 U. S. 358, cited by the plaintiff in error, and that of the Northern Pacific grant. In the Wisconsin Central case it was provided that the selection of indemnity lands was to be made by an agent of the State of Wisconsin, appointed by the governor thereof, subject to the approval of the Secretary of the Interior, while in the Missouri K. & T. Co. grant it was made the duty of the Secretary of the Interior to make such selections. In the Northern Pacific grant it was provided that selections of indemnity lands should be made by the Company under the directions of the Secretary of the Interior. (record 7 and 8). It was not required that the Secretary of the Interior approve the selections. The Minnesota courts have held that the Company had fully complied with all the requirements and instructions of the Land Department which were in force at the time of its selection in June, 1885. (record 28).

The case of Oregon & C. R. Co. v. United States, 189 U. S. 103, is cited by the plaintiff in error as authority for his position, but it should be noted that in that case the court lays special stress upon the fact that the settler had done all in his power to comply with the law, in making a record of his intention to enter the land as a homestead. In that case he was prevented from mak-

ing an application within the statutory time by the government's failure to survey the lands, but as soon as a survey was made promptly took the necessary steps to protect his rights under the homestead laws.

Under such circumstances or where the settler in possession is prevented from making his entry by the lack of a local land office, as was held in the case of Tarpey v. Madsen, 178 U. S. 215, the settler's rights will be protected provided he moves with diligence and to the extent of his power attempts to comply with the requirements of the law. In the present case as has already been pointed out and as was emphasized by the Supreme Court of Minnesota in its decision (record 29) nearly four years elapsed after the selection by the railroad company in 1885, and more than that time after plaintiff's settlement upon the land (record 17) before he made any attempt whatever to enter the land or indicate his attention of holding the same as his homestead, thus forfeiting any rights which he may have acquired by virtue of a settlement. Maddox vs. Burnham, supra.

Respectfully Submitted,

W. E. HALE,

Attorney for Defendant in Error.